NACHATAR SINGH BHAG SINGH

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CRIMINAL APPEAL NO. 51-55-83]
31 OCTOBER 1986

CRIMINAL LAW AND PROCEDURE: *Appellant convicted by Sessions Court for attempting to obtain a bribe of RM100 - Prevention of Corruption Act 1961 - Section 4(a) - Appeal - Complaint made after considerable lapse of time - Whether there was ample opportunity to fabricate a charge - Other considerations - Whether appeal should be allowed.*

The appellant, a police volunteer reserve of the Royal Malaysian Police Force, was prosecuted in the Sessions Court, George Town, with a single count of attempting to obtain a bribe of RM100 in contravention of s. 4(a) of the Prevention of Corruption Act 1961. In the result, he was convicted and sentenced to 8 months' imprisonment. This appeal is against that conviction and sentence.

Held:

[1] The complaint regarding the attempted bribe was not made promptly but after a considerable lapse of time, during which period there was ample opportunity to fabricate a charge.

[2] Some vital considerations appeared to have been overlooked by the learned President.

[3] The Court was satisfied that the charge had not been proved against the appellant beyond all reasonable doubt and that consequently there had been a miscarriage of justice when the learned President had convicted him.

[Appeal allowed. Conviction quashed and sentence set aside. Appellant acquitted and discharged.]

Cases referred to:

Powell & Wife v. Streatham Manor Nursing Home [1935] AC 267
Khoo Sit Hoh & Ors. v. Lim Thean Tong [1912] AC 323
Watt v. Thomas [1947] AC 484
Tengku Mahmood v. Public Prosecutor [1974] 1 MLJ 110

Legislation referred to:

Prevention of Corruption Act 1961, s. 4(a)

For the appellant - Karpal Singh (S.P. Annamalai with him);
For the respondent - Jalaluddin, Deputy Public Prosecutor; Anti-Corruption Agency

JUDGMENT

Edgar Joseph Jr J:

This Appellant, Nachatar Singh s/o Bhag Singh, was prosecuted in the Sessions Court, George Town, with a single count of attempting to obtain a bribe of RM100 in contravention of s. 4(a) of the Prevention of Corruption Act 1961 ("the Act"), the charge being as follows:

That you on 12 March 1980 at about 11.00 p.m. at Jalan Hilir Pemancar, Sungai Glugor, in the district of Georgetown, in the state of Penang, being an agent, viz. Police Volunteer Reserve of the Royal Malaysian Police Force, did corruptly attempt to obtain from one Fadzil bin Abdul Kareen, for yourself, a gratification of a sum of cash RM100, as an inducement for forbearing to do an act in relation to your principal's affairs, to wit to refrain from taking appropriate action against the said Fadzil bin Abdul Kareen for driving a motor cycle No. PQ 1271:

i. Without a valid driving licence,

ii. Without a valid road tax,

iii. Without wearing a crash helmet and

iv. Without displaying the front vehicle registration number.

and that you have thereby committed an offence punishable under s. 4(a) of the Prevention of Corruption Act 42/61 (Laws of Malaysia Act No.57).

In the result, he was convicted and sentenced to 8 months' imprisonment. He now appeals against that conviction and sentence.

Before me, the conviction was at first attacked, by way of preliminary point, namely, that bearing in mind that the charge was one of attempting to obtain a gratification, the learned President had misdirected herself as regards the burden of proof; in particular, the burden on the defence. The following passages in the judgment of the learned President were singled out for special treatment:

The learned DPP Encik Wahab cited the case *C.N. Peters v. The State* AIR [1959] Allahabad 483 wherein it was held that where the accused in his attempt **to rebut the presumption** takes several stands, the very multiplicity of the stands destroy the *bona fide* of them, and they become inadequate to rebut the presumption. (Emphasis supplied.)

I found that the defence was improbable and no doubt had been cast on the prosecution case even on **a balance of probabilities.**

(Emphasis supplied.)

The learned Deputy, who immediately appreciated correct law, conceded that there had indeed been a misdirection as regards the burden of proof as upon a charge of attempting to obtain a gratification in contravention of s. 4(a) of the Act, no presumption could possibly arise in aid of the case for the prosecution and there could therefore be no question of the defence having to rebut the same. However, he sought to salvage the conviction by inviting me to apply the proviso since it was said, that upon the evidence, the learned President would inevitably have arrived at the same decision even had she not misdirected herself as aforesaid.

In these circumstances, I invited both the learned Counsel and the learned Deputy to address me on the merits of the appeal.

The whole of the material evidence was then closely and critically examined before me and it does not appear to me to be necessary to discuss it again in detail.

Suffice it to say, at the risk of being trite, that the learned President had a great advantage, denied to this Court, of seeing and hearing the witnesses but, it has been said, that demeanour is not a touchstone of truth. It may well be also to remember what was said by Lord Wright and often quoted from his judgment in *Powell & Wife v. Streatham Manor Nursing Home* [1935] AC 267 of the possibility of Judges being deceived by adroit or plausible knaves or by apparent innocence.

Demeanour therefore needs to be tested against the rest of the evidence and the probabilities of the case. If therefore it can be demonstrated that the learned President's assessment of the credibility of the witnesses was arrived at as a result of having overlooked or misunderstood considerations relevant to the issue of credibility her conclusions as to credibility cannot in justice be regarded as unimpeachable. In this context, I need no more than refer to a decision of the Privy Council and another of the House of Lords.

In *Khoo Sit Hoh & Ors. v. Lim Thean Tong* [1912] AC 323 the first para of the headnote reads as follows:

> Where upon an issue depending upon oral evidence there is plainly perjury on the one side or the other, a Court of Appeal ought to be greatly influenced by the opinion of the trial Judge, who has seen and examined the witnesses, except where he has failed to observe inconsistencies or to take account of material circumstances or probabilities.

In *Watt v. Thomas* [1947] AC 484 @ 486 to 488, Viscount Simon *inter alia*, said this at p. 486:

> It not infrequently happens that a preference for A's evidence over the contrasted evidence of B is due to inferences from other conclusions reached in the Judge's mind, rather than from an unfavourable view of B's veracity as such: in such cases it is legitimate for an appellate tribunal to examine the grounds of these other conclusions and the inferences drawn from them, if the materials admit of this; and if the appellate tribunal is convinced that these inferences are erroneous, and that the rejection of B's evidence was due to the error, it will be justified in taking a different view of the value of B's evidence. I would only add that the decision of an appellate Court whether or not to reverse conclusions of fact reached by the Judge at the trial must naturally be affected by the nature and circumstances of the case under consideration.

And at pages 487 and 488, Lord Thankerton, in an oft quoted passage enunciated the principles which should guide the Appellate Court in appeals against findings of fact in these terms:

> I. Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself by the Judge, an appellate Court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion;
>
> II. The appellate Court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence:
>
> III. The appellate Court, either because the reasons given by the trial Judge are not satisfactory, or because it is unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate Court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question.

Accordingly, it is with the above principles in mind that I turn to consider such of the facts as strike me as being of importance.

In the first place, a charge of attempting to obtain a bribe is one that is very easy to make as the learned President herself recognised. Moreover, (and this was not mentioned by the learned President) it is usually difficult to rebut.

In the second place, this was a case of the oath of the complainant, a 19 year old factory worker at the time of incident but a police constable aged 23 when he gave his evidence, supported, to some extent, by the testimony of his father and sister, against the oath of the appellant corroborated by the testimony of his more senior colleague.

In the third place, investigations on a "discreet basis" into this case began upon receipt of a letter from the complainant by the National Bureau of Investigation about two weeks after the alleged incident. One would have expected that the letter would have been produced but such was not the case. However, we do know from the formal report made by the investigating officer that it alleged that both the appellant and his colleague aforesaid were accused of having attempted to obtain a bribe of RM100 from the complainant as an inducement for not taking action against the complainant for offences committed in connection with the use of a motorcycle.

In the fourth place, this was obviously not a complaint made promptly but after a considerable lapse of time, during which period there was ample opportunity to fabricate a charge. In the words of Raja Azlan Shah FJ (as he then was) in *Tengku Mahmood v. Public Prosecutor* [1974] 1 MLJ 110:

> It must be made voluntarily and at the earliest convenient moment. It must not be made after a long lapse of 13 days as to allow fabrication.

In the fifth place, although the complainant alleged corruption against both the appellant and his senior colleague, only the appellant was prosecuted, he being arrested one year and 4 months later. It is therefore not unreasonable to assume that even the prosecution did not give much credence to the complaint in so far as it affected the appellant's colleague although this represented a significant part of the complaint. The learned President did not seem to appreciate this point since she merely mentioned in passing "It was the prerogative of the prosecution to charge only one of them".

In the sixth place, both the complainant and his father believed that the complainant had committed no offence against the traffic laws because they were of the view that such laws did not apply to laterite roads. Although the learned President mentioned this fact in her grounds of decision its significance does not appear to have been appreciated. If the complainant and his father were of the view that the appellant had wrongly stopped the complainant and taken possession of the motorcycle with a view to prosecution, this may well have caused them considerable annoyance. This belief and annoyance may have been fortified by the fact that the very next day after the alleged incident the complainant's motorcycle was returned to him by the police and no action was taken against him despite flagrant breaches of the traffic laws. Both the complainant and his father may thus have harboured an *animus* against the appellant for the action he had taken.

In these circumstances, both the complainant and his father had the motive and the opportunity to fabricate a charge of corruption against the appellant. These vital considerations appear to have been overlooked by the learned President.

Lastly, in considering the defence case the learned President appears to have been unduly critical of certain omissions in the report made by the appellant on the night of the incident against the complainant for traffic violations in connection with the use of the motorcycle. These omissions related to certain collateral events and should not have been

allowed to sway the learned President in deciding the sole question for determination, namely, was it proved beyond reasonable doubt that the appellant had attempted to obtain a bribe of RM100 as alleged? In any event, an omission can seldom, if ever, constitute a discrepancy.

In the result, I was satisfied that the charge was not proved against the appellant beyond all reasonable doubt and that consequently there was a miscarriage of justice when the learned President convicted him. Accordingly, this is not a case for the application of the proviso and the result is that the appeal is allowed, the conviction is quashed, the sentence is set aside and the appellant acquitted and discharged.

Also found at [1986] 2 CLJ 452